46

IN THE HIGH COURT OF DELHI AT NEW DELHI

+CS (OS) No. 2656/98

Date of Decision: 3 .08.2007

#National Housing Bank
!

.....Plaintiff
Through Mr. H.S. Parihar

Versus

$Santosh Kumar Bagla & Anr.
^

.....Defendants
Through Mr. Harish Malhotra,
Senior Advocate with
Mr. Balram Srivastava

CORAM :-
***THE HON'BLE MR.JUSTICE A.K.SIKRI**

1.Whether Reporters of Local papers may be allowed to see the Judgment?
2.To be referred to the Reporter or not?
3.Whether the judgment should be reported in the Digest?

A.K. SIKRI, J. (Oral)
:

This is a suit for specific performance of a contract filed by the plaintiff. The plaintiff is a body corporate constituted under the National Housing Bank Act, 1987 and is seeking specific performance of an agreement vide which the defendants were to buy back 3,30,000 equity shares of the face value of Rs.10/- each held by the plaintiff bank in terms of their undertakings dated 8.7.1994 and 2.9.1994.

2. It is averred in the plaint that a limited company by the name of Marnite Polycast Ltd. (now known as MPL Corporation Limited)

Signature Not Verified
Digitally Signed By:AMULYA
Certify that the digital file and physical file have been compared and the digital data is as per the physical file and no page is missing.

(hereinafter referred to as the 'Company') was incorporated vide Certificate of Incorporation dated 31.5.1990 and certificate of commencement of business issued on 18.6.1990. It was promoted by Sh.A.K. Chandra and Sh.V.N.V. Iyengar. This company set up a plant for manufacture of cast polyester molded products at Malanpur, District Bhind. At that time, the company through its promoters, Sh.A.K. Chandra and Sh.Iyengar, approached the plaintiff bank and requested for subscription to the equity in terms of the aforesaid guidelines. This proposal was considered by the plaintiff bank and vide order dated 26.6.1991 read with letter dated 4.7.1991, the plaintiff bank conveyed its decision to participate in the equity of the company to the extent of Rs.20 lacs subject to certain specific and certain usual terms and conditions contained in the said letters. The condition (e) appearing in this letter is as under:-

> "e. The promoters undertake to buy back the shares of the company subscribed by NHB at any time after 5 years of the issue or at such early time as NHB may deem fit. Promoters to buy back NHB's equity contribution at a return of 20% per annum or at the market price, whichever is higher."

3. Thereafter, the company's board meeting was held on 10.7.1991 wherein the aforesaid terms and conditions stipulated by the plaintiff bank were accepted on 16.8.1991. The plaintiff bank executed a letter of specification agreeing to subscribe equity shares of the aggregate face value of Rs.20 lacs out of the total issue of equity shares of the aggregate face value of Rs.133 lacs proposed to be offered by the

47A

company for subscription at par and reiterated that the promoters shall undertake to buy back the shares of the company subscribed by the bank at any time after five years of the issue. On specific undertakings given in the favour of the bank agreeing to buy back the shares in the aforesaid manner at any time after five years of issue or at such earlier time as the bank may deem at the return of 20% or at the market price whichever is higher, the Bank subscribed the equity share capital of the company and received 2,00,000 equity shares, fully paid, vide company's letter dated 7th October 1991. In June 1993, the promoters as well as the defendants No.1 and 2 approached the plaintiff bank for its proposal as to change in management from the promoters to the defendants which was granted by the plaintiff bank vide its letter dated 30.9.1993 subject to the condition that buy back conditions stipulated earlier would remain in force. The defendants No.1 and 2 accepted those terms and conditions and also executed separate undertakings on 8.7.1994 in this behalf. The undertakings of the earlier directors/promoters were accordingly released. The new Management of the company took up an expansion programme costing Rs.1313 lacs with issue component of Rs.1015 lacs in September 1994 and requested the plaintiff Bank to subscribe in the preferential allotment category on firm allotment basis. The plaintiff Bank agreed to the proposal vide its letter dated 26.7.1994 to subscribe to the equity capital in the public issue of the company under preferential allotment category to Indian Financial Institutions to the extent of Rs.32 lacs subject to certain

terms and conditions as contained therein. The conditions relevant for our purposes are as follows:-

> 1) The promoters will buy back 1,90,000 equity shares of the company with a face value of Rs.19 lacs from NHB (out of 2,00,000 equity shares with a face value of Rs.20 lacs presently held by NHB) for a buy back consideration of Rs.32,37,600/- (Rs. Thirty two lacs thirty seven thousand and six hundred). The above amount will be paid and credited in NHB's account at Bombay on or before 4.8.1994.
>
> 2) Fresh equity subscription (reinvestment) will be made only after receipt and credit of entire buy back consideration as stated above in NHB's account.
>
> 3) The promoters Shri Santosh Kumar Bagla and Shri Shiv Kumar Bagla will enter into an agreement with NHB for buy back of the new investment to the extent of Rs.32 lacs (Rupees Thirty two lacs) at a return of 20% p.a. compounded annually or the market value of the share, whichever is higher.
>
> The buy back shall be effected as under:-
>
> a) First 25% of the equity subscription alongwith interest accrued thereon on or before 5.12.95.
>
> b) Next 25% of the equity subscription alongwith interest accrued thereon on or before 5.1.96.
>
> c) Next 25% of the equity subscription alongwith interest accrued thereon on or before 5.2.96.
>
> d) Last 25% of the equity subscription alongwith interest accrued thereon on or before 5.3.96.

4. Defendants No.1 and 2 also agreed and executed separate undertakings on 2.9.1994 in favour of the plaintiff Bank agreeing to buy back the shares of the company as a result of the new investment to the extent of Rs.32 lacs at a return of 20% p.a. compounded annually or the market value of the share, whichever is higher. In terms of the aforesaid

49

undertakings, the buy back was agreed to be effected as follows:-

> a) First 25% of the equity subscription alongwith interest accrued thereon on or before 5.12.95.
>
> b) Next 25% of the equity subscription alongwith interest accrued thereon on or before 5.1.96.
>
> c) Next 25% of the equity subscription alongwith interest accrued thereon on or before 5.2.96.
>
> d) Last 25% of the equity subscription alongwith interest accrued thereon on or before 5.3.96."

5. The plaintiff bank, based on the aforesaid letters and undertakings, subscribed to 3,20,000 equity shares for an aggregate value of Rs.32,00,000 on 6.9.1994 and retained Rs.83,200/- out of the said Rs.32,83,200/- received by it from defendants No.1 and 2. In these circumstances, the plaintiff bank is holding 3,30,000 equity shares of the face value of Rs.10/- each which the defendants have undertaken to buy back as follows:-

> a) 10,000 equity shares of the face value of Rs.10 each aggregating to Rs.1,00,000 (being the shares remaining after purchase of 1,90,000 shares) which the Defendants are liable to buy back at any time after five years of the issue or such early time as NHB may deed fit at a return of 20% p.a. or at the market price whichever is higher in terms of the undertakings executed by them on 8th July 1994 and which are still subsisting and binding on the Defendants;
>
> b) 3,20,000 equity shares of the face value of Rs.10 each aggregating to Rs.32,00,000 representing new investment by the Plaintiff Bank in the company which the Defendants Nos.1 and 2, are liable to buy back at a return of 20% p.a. compounded annually or the market value of the shares, whichever is higher in terms of the undertakings executed by them on 2nd

50

September, 1994 and which are still subsisting and binding on the Defendants, as follows:-

a) First 25% of the equity subscription alongwith interest accrued thereon on or before 5.12.95.

b) Next 25% of the equity subscription alongwith interest accrued thereon on or before 5.01.96.

c) Next 25% of the equity subscription alongwith interest accrued thereon on or before 5.02.96.

d) Last 25% of the equity subscription alongwith interest accrued thereon on or before 5.03.96.

5. The plaintiff bank vide its letter dated 4.12.1995 requested the defendants No.1 and 2 to buy back the shares. This request was followed up and vide letter dated 23.12.1995 the defendants assured to buy back the same. However, the defendants failed to honour their commitments even when repeated reminders in the form of letters dated 17.6.1997 and 12.8.1997 were given, though the defendant No.1 vide letter dated 22.8.1997 again represented that he stood by the undertakings given by him. Thereafter also further correspondence was exchanged as mentioned in para 15 and ultimately present suit filed with the following prayers:-

(a) that the defendants be ordered and directed to buy back the 3,30,000 equity shares of the face value of Rs.10/- each held by the plaintiff Bank in terms of their undertakings dated 8th July, 1994 and 2nd September 1994 which the Defendants have undertaken to buy back in the following manner:

i) the defendants be ordered and directed to buy back 3,20,000 equity shares of the face value of Rs.10/- each aggregating to Rs.32,00,000 which they have undertaken to buy back at a return of 20% p.a. compounded annually in terms of the undertakings

executed by them on 2nd September 1994;

ii) the Defendants also be ordered and directed to buy back 10,000 equity shares (being the shares remaining after buying back of 1,90,000 shares) of the face value of Rs.10/- each aggregating to Rs.1 lacs at a return of 20% p.a. from the date of issue and till the date of purchase in terms of the undertakings executed by them on 8th July 1994;

(b) Alternatively, as the shares are not of any value much to the own knowledge of the Defendants, the Defendants be ordered and directed to pay to the Plaintiff Bank as and by way of compensation a sum ofRs.73,23,607.05 being the amount invested by the Plaintiff Bank in 3,30,000 shares of the face value of Rs.10/- each together with return on the same at the rate of 20% per annum as detailed in the Annexure-A to this suit.

c) Pendente lite and future return at the rate of 20 per cent per annum from December 1, 1998 and till the date of payment of the compensation may also be granted in favour of the Plaintiff Bank and against the defendants.

d) cost of the suit be also awarded to the Plaintiff Bank and against the Defendants.

6. It is also mentioned that shares of the company are listed in Bombay Stock Exchange but have no free market and no buyers are available.

7. The ;suit was filed in the year 1998. Along with the suit, the plaintiff had also filed application under Order 39 Rules 1 and 2 CPC (IA No.10971/98). While issuing summons in the suit, in the said application *ex parte* ad interim order was passed on 4.12.1998 restraining the defendants from transferring, alienating, disposing of or parting with the possession of the properties mentioned in Annexure-A to the application. The defendant No.1 was served by ordinary process for 11.2.2000. In so

far as the defendant No.2 is concerned, as it could not be served in an ordinary manner, the plaintiff's application under Order 5 Rule 20 CPC for substituted service on the defendant No.2 was allowed and the defendant No.2 was served by publication in 'The Statesman'. Since the written statement was not filed in spite of repeated opportunities, on 10.12.2001 last opportunity of four weeks was granted for filing the written statement. In spite thereof, written statement was not filed. Still, vide order dated 22.4.2002, one further opportunity of four weeks was granted for this purpose. However, even thereafter no written statement was filed. On the next date, i.e. 9.8.2002, nobody appeared on behalf of the defendants either. Order was passed proceeding *ex parte* against the defendants and permission was granted to the plaintiff to lead evidence by way of affidavit. The defendants filed application for setting aside *ex parte* proceedings, which was allowed by order dated 8.11.2004, subject to payment of Rs.7,000/- as cost. Another opportunity of four weeks was granted to file the written statement. Still, written statement was not filed. On 13.7.2005, therefore, order was passed to the effect that *ex parte* order remains. The plaintiff had filed evidence by way of affidavit of Sh.Lalit Kumar on 25.10.2002. He appeared on 22.9.2005 and his affidavit was taken on record. Documents were also exhibited. The defendants, however, filed review application seeking review of the order dated 13.7.2005, which review application was dismissed on 3.2.2006. The matter was, therefore, listed before the Court for final arguments.

8. Though I heard the matter and reserved the judgment, it was not pronounced by me for some time as the defendants had challenged the order dated 13.7.2005 and 3.2.2006 by filing appeal before the Division Bench. In the meantime, the defendants filed application in this Court with the prayer that judgment be not pronounced. After waiting for quite some time, I listed the matter for directions on 11.5.2007 on which date it was adjourned to 13.7.2007. On 13.7.2007, I was informed that the appeal preferred by the defendants and pending before the Division Bench was time-barred and notice was issued only in the application for condonation of delay. Since there was no stay of the proceedings, I deemed it proper to proceed with the judgment without waiting further. For this reason another application filed by the defendants for stay of the proceedings in the suit was dismissed on 27.7.2007.

9. In the affidavit filed the witness has traversed various averments mentioned in the plaint and already taken note of above. He has also produced on record various documents, which are exhibited as P-1 to P-29. Ex. P-1 is a Gazette Notification dated 9.4.1994 in respect of powers vested on the General Manager/Assistant Manager etc. of the plaintiff bank as per which, officials of this rank are allowed to sign and verify the plaint and institute the suits. Present suit is filed by Sh.B.C.S. Baliga, who was the then General Manager of the plaintiff bank. Ex. P-2 is the letter of authorisation in favour of Sh. Lalit Kumar to appear as a witness and lead evidence. Ex. P-3 are the GUIDELINES FOR FINANCIAL

ASSISTANCE IN THE FORM OF EQUITY PARTICIPATION FOR BUILDING MATERIAL INDUSTRIES. These guidelines, *inter alia,* provide that the plaintiff bank would extend equity support up to 30% of the paid up capital of a public/private company on merits of each case. Exhibits P-4 and P-5 is the letter dated 26.6.1991 and 4.7.1991 vide which decision of the plaintiff bank was conveyed to the defendants to participate in the equity of the defendant company to the extent of Rs.20 lakhs, subject to certain specific terms and conditions.

10. The Board of Directors of the defendant company exhibited the aforesaid terms in its meeting held on 10.7.1991. Ex.P-6 is the Resolution of the company to this effect. Ex.P-7 is the Letter of Subscription by the plaintiff agreeing to subscribe equity shares of the aggregate value of Rs.20 lakhs out of the total issue of equity shares of the aggregate face value of Rs.133 lakhs proposed to be offered by the company for subscription at par. In Clause 35 of the said letter of subscription, the plaintiff bank reiterated that the promoters shall undertake to buy back the shares of the company subscribed by the plaintiff bank at any time after five years on the issue or such early time as the plaintiff bank may deem fit at a return of 20% per annum or at the market price, whichever is higher. Ex. P-8 and Ex. P-9 are the undertakings of Sh.A.K. Chandra and Sh. V.N.V. Iyengar in favour of the plaintiff bank in terms of Clause-35. Vide these undertakings they undertake to buy back the shares of the company subscribed by the plaintiff bank in terms of Ex. P-7,

at any time after five years of the issue or such early time as the plaintiff bank may deem fit at a return of 20% per annum or at the market price whichever is higher. In these undertakings Sh. A.K. Chandra and Sh. Iyengar also agreed that their undertakings shall remain in force so long as the plaintiff bank continues to be the shareholder of the company. This witness has specifically averred that relying upon the representations and aforesaid undertakings, the plaintiff bank subscribed in the equity share capital of the company to the extent of Rs.20 lakhs on 5.9.1991 and received Rs.2 lakhs equity shares of Rs.10/- each fully paid up along with company's letter dated 7.10.1991. This letter is filed as Ex. P-10. Ex. P-11 and Ex. P-12 are the letters vide which the plaintiff bank had agreed for change in the management from Sh. A.K. Chandra and Sh. V.N.V. Iyengar to Sh. S.K. Bagla and Associates. Ex. P-13 and Ex. P-14 are the undertakings executed by the defendant Nos.1 and 2 as new promoters accepting same terms and conditions stipulated in the plaintiff's letter dated 24.12.1993. On acceptance of these undertakings of the new promoters, i.e. the defendant Nos.1 and 2, vide letters dated 9.8.1994 (Ex. P-15) Sh. Chandra and Sh. Iyengar were released from their undertakings given earlier. Ex. P-16 is the acceptance by the plaintiff bank of the proposal submitted by the defendants requesting the plaintiff bank to subscribe in the preferential allotment category on firm allotment basis to the extent of Rs.32 lakhs in view of expansion programme of the defendant No.1 company. On 8.7.1994, the defendant Nos.1 and 2 purchased 1,90,000

equity shares held by the plaintiff bank in the company leaving balance 10,000 equity shares. Ex.-17 and Ex. P-18 are the separate undertakings executed by the defendant Nos.1 and 2 on 2.9.1994 agreeing to buy back the shares of the company to the extent of newly invested Rs.32 lakhs on a return of 20% per annum compounded annually or the market value of the share whichever is higher. Pursuant thereto, the plaintiff bank subscribed to Rs.3,22,000 equity shares on an aggregate value of Rs.32 lakhs.

11. The witness has further stated that vide letters dated 4.12.1995 (Ex. P-20), 23.12.1995 (Ex. P-21), 17.6.1997 (Ex. P-22 and P-23) and 12.8.1997 (Ex. P-24) requested the defendants to buy back those shares. On 22.8.1997, the defendant No.1 wrote letter to the plaintiff bank (Ex. P-25) representing that he stood by the undertakings to buy ; back the shares but wanted some more time to overcome the financial crisis. The defendant No.2, however, did not give any reply even when another letter dated 30.9.1997 (Ex. P-26) was addressed to him followed by letters dated 29.10.1998 (Ex. P-27 and P-28) to both the defendants. It is also averred that the Vice-President of the company sent letter dated 11.11.1998, produced as Ex. P-29, requesting for time upto 31.3.1999 to buy back their shares. In this, it is also undertaken to pay additional interest at the rate of 20% per annum till final payment is made. In view of the aforesaid unrebutted testimony and in the absence of any written statement, I am inclined to believe the aforesaid version of the plaintiff

bank, which is supported by documentary evidence. As the shares are not of much value, prayer (b), which is the alternate prayer, is allowed and decree in the sum of Rs.73,23,607.05P. is passed in favour of the plaintiff and against the defendants whose liability to pay the amount shall be joint and several. *Pendente lite* and future interest at the rate of 10% per annum is also awarded in favour of the plaintiff and against the defendants from December 1, 1998 till the payment of the compensation. The plaintiff shall also be entitled to costs. Decree be drawn accordingly.

August 3, 2007
HP.

(A.K. SIKRI)
JUDGE